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No. 85-1966

In the Supreme Court of the United States

OCTOBER TERM, 1986

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition is untimely because all issues in this case were finally resolved by a 1984 decision of the court of appeals.

2. If not, whether the court of appeals' test for valuing pipeline easements, which takes into account the value of the parent tracts before and after a taking by the government, is improper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 783 F.2d 1256; previous opinions of the court of appeals in this case are reported at 680 F.2d 388 (Pet. App. 47a-59a) and 731 F.2d 1207 (Pet. App. 79a-84a). Relevant opinions of the district court are reported at 507 F. Supp. 589 (Pet. App. 25a-41a), 576 F. Supp. 685 (Pet. App. 63a-78a), and 595 F. Supp. 731 (Pet. App. 93a-100a).

JURISDICTION

The court of appeals issued its opinion on March 3, 1986 (Pet. App. 1a-8a). The petition for a writ of certiorari was filed on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). As noted below, however (pages 6-8, *infra*) a prior judgment of the court of appeals, which was entered on May 14, 1984, finally resolved all

disputed issues and directed the entry of a specific judgment in this case. This petition accordingly is untimely.

STATEMENT

This case arose in March 1978, when the United States sought to condemn pipeline easements across three adjacent parcels of land in Orange County, Texas. One tract of approximately 700 acres is owned by petitioner KWW Associates (KWW) (Pet. App. 49a). The other two tracts are owned by petitioner Firestone Tire & Rubber Co. (Firestone), and together contain some 1,100 acres (*ibid.*). All three tracts are bisected by an existing road and row of pipelines, often described as a "pipeline corridor." The easements at issue here, which are 50 feet in width, adjoin the north side of this pipeline corridor. Shortly after the filing of a declaration of taking, the Department of Energy placed a single 42-inch pipeline within the acquired easements to serve the Strategic Petroleum Reserve. *Ibid.*

The District Court for the Eastern District of Texas appointed a three-person Condemnation Commission to make findings on just compensation. Initially, the district court instructed the Commission to make this determination by calculating the fair market value of the tracts immediately before the taking and then subtracting the value of what remained of the tracts immediately after the taking (the so-called " 'before-and-after' " method) (Pet. App. 49a n.1). The government's valuation witness followed this approach (*id.* at 50a). After opining that the highest and best use of the tracts was for industrial plant sites, he concluded, based on prices obtained in several recent sales of similar tracts, that application of the before-and-after test should result in an award of $16,695 for KWW and $21,700 for Firestone (*ibid.*).

Petitioners' expert witnesses, however, forsook the before-and-after method for a theory of easement valuation that considered the 50-foot strips of condemned land as

" 'severed' "—and therefore separately valued—from the parent tracts. These witnesses estimated that the KWW easement was worth $85,000 and the Firestone easements $132,751 (Pet. App. 51a). The Commission agreed that the easements had been "severed" from the rest of the property, and awarded compensation in the amounts testified to by petitioners' witnesses (*id.* at 18a, 23a). The district court affirmed the commission's findings, notwithstanding its earlier instruction regarding the use of the before-and-after method (*id.* at 25a-41a).

The court of appeals reversed (Pet. App. 47a-59a) ("*Orange County I*"). The court held the finding that the easement strips had been severed from the parent tracts to be clearly erroneous (*id.* at 57a). It noted that "[i]n each instance * * * the condemned strip of land had an integrated use with the parent tract—namely, pastureland," and that the strip did not lie between existing pipelines "but rather at the edge of a large field adjacent to existing pipeline easements" (*id.* at 55a-56a). In these circumstances, the court explained, "the proper measure of damages is * * * the before-and-after method of valuation, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement" (*id.* at 52a-53a), adding that the property should be valued "as a whole rather than [as] the sum of the various uses to which it has been placed" (*id.* at 58a). The court also noted that petitioners already had been given an opportunity to prove that the compensation offered by the government was inadequate, but that they had failed to produce proper valuation evidence. The court of appeals therefore remanded the case to the district court for a determination of fair compensation based upon the evidence of comparable sales already introduced by the government; the court of appeals expressly directed the district court to rely upon the existing record and to refrain from holding additional evidentiary hearings. *Id.* at 59a.

Upon remand, however, the district court proceeded to hear additional valuation evidence (Pet. App. 80a). The United States promptly sought a writ of mandamus to require the district court to decide the case on the existing record, as directed by the court of appeals. While the request for mandamus was denied, the court of appeals made clear its expectation that judgment would be entered in accordance with the government's theory of valuation and on the basis of the government's evidence of comparable sales (*id.* at 62a).

Notwithstanding this expectation, the district court permitted petitioners to offer additional evidence. At a hearing on February 24, 1983, petitioners' valuation witness testified that the taking of the easements had caused substantial severance damages to the remainder of the parent tracts by blocking access to the property. The district court accepted this severance damage theory (Pet. App. 72a-73a), finding that the tracts in their entirety were damaged by the taking in the amount of $465 per acre. This resulted in an award of $275,280 for Firestone and $81,375 for KWW (*id.* at 76a-77a).

On the government's appeal, the court of appeals again reversed (Pet. App. 79a-84a) ("*Orange County II*"), explaining that the district court's action was inconsistent with the mandate of *Orange County I*. The court of appeals also found that it was able to itself determine just compensation for the taking, noting that petitioners had conceded the validity of the government's before-and-after figures, at least when the properties were viewed as industrial sites and improper severance damages were eliminated (*id.* at 83a). The court of appeals therefore remanded the case, directing the district court to enter judgment in specified amounts (*id.* at 83a-84a).

The district court at first complied with this new mandate by entering judgment as directed in *Orange County II* (Pet. App. 87a, 92a). Soon afterwards, however, the court granted petitioners' motion for a new trial (*id.* at 93a, 100a). The government again petitioned the court of appeals for a writ of mandamus, this time successfully (*id.* at 101a). In granting the writ, the court of appeals observed that "a new trial would serve no purpose other than that of circumventing the mandate issued by a prior panel of this court" (*id.* at 103a). The district court therefore was directed to enter judgment in accordance with the court of appeals' mandate in *Orange County II* (*ibid.*).

The district court complied with the writ, vacating its order for a new trial and entering judgment in the amounts specified in *Orange County II* (Pet. App. 105a-107a). Petitioners then appealed, and the court of appeals affirmed (*id.* at 1a-8a). The court noted that the "the issues presented to this panel were addressed and resolved in the two prior appeals in this case," and that "[b]ecause [petitioners] now appeal from a judgment of the district court which was entered in strict accordance with the second opinion of this Court, there is nothing presented for review in this case" (*id.* at 5a). The court accordingly held that "[t]he doctrine of the law of the case forecloses a different result [from] that which was obtained in the earlier two appeals" (*id.* at 5a-6a).

ARGUMENT

The decision of the court of appeals in this case is correct, does not conflict with any decision of this Court or any other court of appeals, and does not present any issue warranting this Court's review. Petitioners' challenges, moreover, are time-barred, because they failed to seek certiorari from the court of appeals' 1984 decision in *Orange County II*, which finally resolved all issues in this case.

1. The petitioners here seek review of rulings made in *Orange County I* regarding the proper method of determining just compensation. Petitioners were not required to seek a writ of certiorari within 90 days of that decision because the court of appeals there left open the amount of just compensation to be awarded. *Orange County II*, however, resolved this issue by setting out the precise amounts that petitioners were to receive (see Pet. App. 84a). The present challenge therefore should have been brought within 90 days of the judgment in *Orange County II*.

The principles controlling here are set out in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) (footnotes omitted):

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

See also *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[i]f the court did no more by the second judgment than to restate what it had decided by the first one * * * the 90 days would start to run from the first judgment"); *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267 (1942). Cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (" 'mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be

sought' "). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 314-316 (6th ed. 1986).

Petitioners do not claim, nor could they, that the decision below changed matters of substance or resolved a genuine ambiguity in the judgment rendered in *Orange County II*. Indeed, the opinion below makes clear that the "issues presented to this panel were addressed and resolved in the two prior appeals in this case" (Pet. App. 5a). Nor do petitioners claim that the procedural posture of the case made a petition for certiorari inappropriate after the decision in *Orange County II*. The petition presents no question that was not fully ripe for this Court's consideration at that time.

The rule that a petition must be filed within 90 days of a judgment that finally resolves all relevant issues is rooted in "the principle that litigation must at some definite point be brought to an end" (*Minneapolis-Honeywell*, 344 U.S. at 213 (footnote omitted)). The importance of this principle is clearly illustrated by the facts of this case. The ruling in *Orange County II* should have brought to a close a case that already was on its third trip to the court of appeals—two of which patently should have been unnecessary.[1] The court of appeals' decision in *Orange County II* left no doubt that the case had been fully and finally resolved. No reason appears why petitioners could not then have sought certiorari. Instead, they attempted to circumvent the clear mandate of *Orange County II* by moving for a new trial. This course resulted in two additional trips to the court of appeals. The proceedings here therefore present a clear case for invoking the rule requiring the filing of a petition within 90 days of judgment.

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[1]As noted in *Orange County II*, the district judge expressed the view that the court of appeals has no right " 'to dictate to the district court what evidence he shall hear * * *' " (Pet. App. 82a). The court of appeals ultimately was forced to the "extraordinary [step]" (*id.* at 102a) of issuing a writ of mandamus to achieve compliance with its instructions.

2. Even if it were not time-barred, petitioners' claim would lack merit. Before the Commission, petitioners proceeded on the theory that the 50-foot strip affected by the easement should be analyzed as a "severed" parcel, with value based on the amount that private companies pay to buy pipeline easements. The court of appeals in *Orange County I* rejected this theory because the easement strips were integral parts of larger tracts. On remand, petitioners advanced a new theory—that the easements damaged the large parent tracts by threatening to cut off access to them should the government decide to lay additional pipelines (see Pet. App. 73a, 80a). That theory was rejected in *Orange County II*.

Petitioners do not now take issue with the rejection of their two earlier theories. Instead, they offer a third challenge to the government's valuation: they claim that the proper test involves a comparison of the pre-taking market value of the tracts, including the landowners' ability to sell pipeline easements, with the after-taking market value of the tracts, modified by the fact that "one of a finite number of possible sales of easements in the corridor has been made" to the government, which in turn may assign its rights (Pet. 13-14). Petitioners contend (*id.* at 14) that this method would yield a result that would "closely approximate" the prices paid for pipeline easements.

We note at the outset that this theory was not advanced until after the court of appeals had directed the entry of judgment in *Orange County II*. The court of appeals failed to consider this method of valuation in its opinion below, holding that *Orange County II* had finally resolved all of the issues in this case. Petitioners accordingly are precluded from presenting this theory to the Court.

In any event, petitioners' theory is fundamentally unsound. Their position evidently is that the existing row of pipelines made the next adjacent strip of land especially

valuable for sale as a pipeline easement, because pipeline builders prefer to follow existing "corridors." But even if that is the case, the government did not take this element of value. The purported special value in adjacency to a pipeline corridor was simply displaced 50 feet northward. Because the tracts involved here are very large (Pet. App. 49a), the landowners did not lose any significant ability to take advantage of the pipeline corridor. Indeed, shortly after the declaration of taking was filed in this case, the landowners sold two successive easements alongside the government's easement (I Tr. 160).

"It is the owner's loss, not the taker's gain which is the measure of the value of the property taken." *United States* v. *Causby*, 328 U.S. 256, 261 (1946), citing *United States* v. *Miller*, 317 U.S. 369 (1943). What was lost in this case was nothing more than the right to use the surface of the 50-foot strips in a way that would interfere with the government's right to repair its pipeline. The government's appraiser properly accounted for this loss by awarding 90% of the value of this strip, considered as industrial property.[2]

The cases cited by petitioners (Pet. 9-11) stand only for the proposition that the government must compensate a landowner for the loss of a particular element of value (such

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[2]Even in a case where the taking of an easement detracted from the owner's ability to take advantage of a pipeline corridor, the measure of this loss would not be the equivalent of the amount that pipeline companies pay for easements. The evidence in this case showed that pipeline companies regularly pay "hold-up" prices to landowners, due to the enormous expense of going around a particular parcel once a route is laid out (I Tr. 70-71, 334, 352-353, 358-359). The government is not required to pay just compensation on the basis of prices that are inflated by the landowners' ability to hold up a project. See, *e.g.*, *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 79-81 (1913); *McGovern* v. *New York*, 229 U.S. 363, 371-372 (1913). In any event, the parcels here were large, and there was no evidence that the taking of the government's easements would measurably diminish petitioners' ability to grant additional ones.

as a quarry) contained in a larger tract of land, where that element contributes to the overall value of the parcel. Those cases are simply irrelevant here, however, because petitioners did not lose whatever special value might inhere in having land next to a pipeline corridor. And far from articulating a conflicting standard, the court of appeals in *Orange County I* acknowledged that "[t]he district court must * * * value the property as a whole rather than the sum of the various uses to which it has been placed" (Pet. App. 58a).

3. Petitioners also suggest (Pet. 12 n.4) that the court in *Orange County I* denied them due process by foreclosing the introduction of new evidence on remand. As the court of appeals explained in its decision below, however, there was no unfairness in this. Because "it had long been established that the exclusive method in the Fifth Circuit for valuation of partial takings was the before-and-after methodology * * * [petitioners] should have plainly anticipated the requirement to put on evidence comporting with that theory." Having made a "tactical decision" to proceed solely under an " 'unorthodox' " theory, petitioners were not in a position to demand another opportunity to present evidence on valuation. Pet. App. 7a n.1. And as the court of appeals noted (*ibid.*), *duPont* v. *United States*, 385 F.2d 780, 784 (3d Cir. 1967), relied on by petitioners here (Pet. 12 n.4), is inapposite; the appellants in that case were given an opportunity to present additional evidence on remand because they could not have anticipated that their initial evidence would be ruled incompetent.[3] Due process does

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[3]Indeed, in this case the district court had specifically instructed the commission to use the " 'before-and-after' " method of valuation (Pet. App. 49a, n.1). In any event, when petitioners mistakenly were given an additional chance to introduce evidence after *Orange County I*, they proceeded under a severance damage theory that they have since abandoned.

not require that a litigant who voluntarily forgoes a reasonable opportunity to present evidence be given a second chance when his unorthodox theory is rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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